N THE UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF PENNSYLVANIA

WRS, INC., d/b/a WRS MOTION PICTURE LABORATORIES, a corporation Plaintiff, v. PLAZA ENTERTAINMENT, INC., a corporation, ERIC PARKINSON, an individual, CHARLES von BERNUTH, an individual and JOHN HERKLOTZ, an individual Defendants	)	No. 2:00-CV-2041-AJS

MOTION FOR RECONSIDERATION OR FOR RELIEF FROM JUDGMENT

Defendant Charles von Bernuth, by and through his undersigned counsel and pursuant to Federal Rule of Civil Procedure 60(b)(6), or, in the alternative, pursuant to this Court's inherent authority to reconsider its prior rulings, hereby files this Motion for Reconsideration or for Relief from Judgment, and support thereof avers as follows:

1. Throughout that history of this case, Defendant Charles von Bernuth, as well as Defendants Eric Parkinson and Plaza Entertainment, Inc., were represented by John W. Gibson, a member of the bar of the Supreme Court of Pennsylvania and of this Court. (Affidavit of John W. Gibson in Support of Defendant Charles von Bernuth's Request for Relief Under Fed. R. Civ. P. 60 ¶¶3-4.)

2. From the beginning of this seven-year representation, Attorney Gibson made only sporadic and cursory of reports to Mr. von Bernuth, with months and sometimes even more than

a year passing with no contact between Attorney Gibson and Mr. von Bernuth. (Affidavit of Charles von Bernuth in Support of Request for Relief Under Fed. R. Civ. P. 60 ¶ 6.)

3. This lack of communication did not cause Mr. von Bernuth alarm. He had no prior experience with Pennsylvania litigation and did not know what level of communication to expect from his attorney. Moreover, the few reports that Mr. von Bernuth did receive indicated to Mr. von Bernuth that Attorney Gibson had the case in hand and that things were proceeding well. Id. ¶ 7.

4. Indeed, by Order of February 14, 2002, the case was administratively closed, and on September 15, 2003, this Court denied a motion by Plaintiff WRS, Inc. ("WRS") to reopen the case.

5. WRS took an appeal from the denial of its motion to reopen the case, and, following that appeal, on July 29, 2005, this Court entered an order reopening the case.

6. On March 9, 2006, a status/settlement conference was conducted. At that conference, this Court set March 23, 2006 as the date for parties to file motions for summary judgment. This Court also determined that the parties should at their equal cost employ Schneider Downs as an accountant to review WRS' account records, which were in dispute. (Gibson Affidavit ¶ 9.)

7. Attorney Gibson informed Mr. von Bernuth that Mr. von Bernuth might at some point be required to make a payment for accountant fees and told him that he would contact him when the amount of the payment was determined. (Gibson Affidavit ¶¶ 12-13; Von Bernuth Affidavit ¶ 10.)

8. This was the last contact Mr. von Bernuth received from Attorney Gibson. (Gibson Affidavit ¶¶ 17-36; Von Bernuth Affidavit. ¶ 13-17.)

9. Attorney Gibson never followed up with Mr. von Bernuth when the amount was determined, nor made any effort to collect or make the required payment. (Gibson Affidavit ¶ 19.)

10. Given the prior course of dealing between Mr. Gibson and Mr. von Bernuth, where Mr. von Bernuth frequently would not hear from Mr. Gibson for long periods of time, he did not think anything was amiss, but assumed that the payment either had not yet been determined or had proved unnecessary. (Von Bernuth Affidavit ¶ 14.)

11. In fact, on April 12, 2006, about a month after the case status/settlement conference that Attorney Gibson attended, WRS filed a Motion to Show Cause Why a Default Should Not Be Entered as to Defendant Charles Von Bernuth. The Motion recited the failure to file a Motion for Summary Judgment and the failure to make a payment of a portion of the accountant's fee as a purported basis for concluding that Mr. von Bernuth no longer intended to defend the matter.

12. Attorney Gibson neither notified Mr. von Bernuth of the filing of this Motion nor filed any response. (Gibson Affidavit ¶¶ 22-23.)

13. On April 18, 2006, this Court entered an Order requiring Mr. von Bernuth to show cause why he should not be defaulted. A response date of April 25, 2006 was set.

14. Attorney Gibson again failed to advise Mr. von Bernuth of the filing of this Order and did not respond to the Order. Id. ¶ 25.

15. On April 28, 2006, the Court directed the Clerk to enter a default under Rule 55(a) against Mr. von Bernuth, and a default was entered that same day.

16. Continuing his pattern of gross neglect of his professional obligations to Mr. von Bernuth, Attorney Gibson did not advise Mr. von Bernuth of the entry of a default. See id. ¶ 27. Likewise, he did not take any action on behalf of Mr. von Bernuth to open the default or have the matter reconsidered. See id. ¶ 28.

17. On October 13, 2006, a Motion for Default Judgment was filed against Mr. von Bernuth, who had also by this time been defaulted. The Motion sought to fix the amount of Mr. von Bernuth's liability in excess of $2.5 Million.

18. Again, in gross dereliction of his duties, Attorney Gibson failed to notify Mr. von Bernuth of the filing of this Motion. See id. ¶ 30. He also failed to make any response to the Motion on his behalf. See id.

19. On February 20, 2007, the Court entered an Order granting a judgment against Mr. von Bernuth in the sum of $2,584,749.03.

20. Not surprisingly, Mr. Gibson did not notify Mr. von Bernuth that a judgment of more than $2.5 million had been entered against him. (See id. ¶¶ 35-36, 41-42; Von Bernuth Affidavit ¶¶ 15-16.) He made no attempt to induce this Court to reconsider the judgment. He filed no appeal from the judgment. He simply did nothing. (Gibson Affidavit ¶¶ 34-38.)

21. On May 21, 2007, Attorney Gibson's other client, Defendant Eric Parkinson, sent an email to Mr. Von Bernuth, on which Attorney Gibson was copied. (*See* Exhibit 1 to Exhibit A hereto.) In the e-mail, apparently unaware of the appeal more than four years previous, Mr.

Parkinson expressed his understanding that the case against himself, Mr. von Bernuth and Defendant Plaza Entertainment had been dismissed.

22. Attorney Gibson emailed Mr. Parkinson a response in which he informed him **for the first time** that default judgments had been entered against him and against Mr. Von Bernuth. (Gibson Affidavit. ¶ 36; Exhibit 1 to Gibson Affidavit.)

23. Even then, however, Attorney Gibson sought to minimize the significance of such judgments, stating that there was a strong basis for reversal on appeal, notwithstanding the fact that the appeal to which he referred was taken only by Defendant Herklotz. (Gibson Affidavit ¶ 37; Exhibit 1 to Gibson Affidavit.) He indicated to Mr. Parkinson that he would be willing to enter an appearance in the Herklotz appeal if Mr. Parkinson would bring his bill current. (*See* Exhibit 1 to Gibson Affidavit.)

24. In fact, it was Mr. Parkinson's alleged failure to pay Attorney Gibson's fees that appears to have been the immediate cause of Attorney Gibson's inexcusable dereliction in his duty to defend his clients. (Gibson Affidavit ¶¶ 13-17.)

25. Attorney Gibson acknowledges, however, that Mr. von Bernuth always faithfully paid Mr. Gibson for his services. See id. ¶¶ 14, 40. Moreover, Mr. von Bernuth never indicated any problem or difficultly in continuing to do so or in paying his share of the accountant's fee at such time as an amount was determined. See id.

26. Shortly after Mr. Parkinson received the May 21, 2006 email from Attorney Gibson informing him of the judgments against himself and Mr. von Bernuth, Mr. Parkinson in turn informed Mr. von Bernuth. (Gibson Affidavit ¶¶ 36-37, 41; Von Bernuth Affidavit ¶ 16.)

This was the first that Mr. von Bernuth heard of the more than $2.5 million judgment that had been entered against him. See id.

27. He promptly obtained new counsel, first in California, and then in Pennsylvania. (Von Bernuth Affidavit ¶¶ 18-19; Exhibit 1 to Gibson Affidavit.)

28. In sum, Attorney Gibson was repeatedly and inexcusably derelict in his nonperformance of his professional duties to provide competent representation to Mr. von Bernuth, *see* Pennsylvania Rule of Professional Conduct 1.1, to act with reasonable diligence and promptness in representing Mr. von Bernuth, *see* Pennsylvania Rule of Professional Conduct 1.3, and to keep Mr. von Bernuth informed about the status of the case and explain the case sufficiently to permit Mr. von Bernuth to make informed decisions regarding the representation, *see* Pennsylvania Rule of Professional Conduct 1.4.

29. Attorney Gibson himself acknowledges that he has "no excuse for [his] failure to properly defend clients for which [he] had entered an appearance that has never been withdrawn . . . [and] for his conduct in failing to keep Mr. Von Bernuth informed and advised that a default was being entered against him and later that his liability was being fixed in an amount in excess of $2.5 Million without opposition by [Attorney Gibson]." (Gibson Affidavit ¶¶ 39, 41.)

30. Attorney Gibson's neglect amounted to an abandonment for which Mr. von Bernuth was in no way responsible.

31. To permit the judgment against Mr. von Bernuth to stand in these circumstances would be an injustice that would undermine public confidence in the administration of justice.

32. This is particularly true where Mr. von Bernuth in fact has numerous meritorious defenses to WRS's claims against him, which, through his counsel's dereliction, were not presented to this Court.

WHEREFORE, Defendant Charles von Bernuth respectfully requests that this Court enter an Order vacating the judgment against Mr. von Bernuth as to both liability and damages and thereby affording Mr. von Bernuth the opportunity to defend on the merits.

Respectfully submitted,

/s/ James R. Walker

James R. Walker, Esquire
Pa I.D. # 42175
Manion McDonough & Lucas, P.C.
Firm I.D. No. 786
600 Grant Street, Suite 1414
Pittsburgh, PA 15219
jwalker@mmlpc.com
(412) 232-0200

Attorney for Defendant Charles von Bernuth

Date: October 16, 2007